86-1156

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No. 86-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

D. E. RHODEN,
Petitioner,

v.

MICHAEL LITTLES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Does qualified immunity bar respondent's 42 U.S.C. §1983 action for damages against petitioner in his individual capacity, which §1983 action is based solely on an asserted deprivation of a 14th Amendment due process liberty interest arising from an alleged random and unauthorized January 19, 1983 assault by petitioner upon respondent, either:

(1) Because there is no 14th Amendment violation, let alone a violation of a 14th Amendment due process liberty interest to bodily integrity, where the conduct (even though intentional) is random and unauthorized and where there exist adequate post-deprivation state court tort remedies available to redress such conduct; or

(2) Because at a minimum at the time of the conduct complained of (January 19, 1983) constitutional law was not clearly established, was clearly unsettled, as to whether the random and unauthorized use of undue force by a state actor upon an individual's person constituted a constitutional deprivation of such individual's 14th Amendment due process liberty interest to bodily integrity, in light of the existence of adequate post-deprivation state court tort remedies available to redress such deprivation.

PARTIES TO THE PROCEEDING

The parties in the Eleventh Circuit were appellant-petitioner D. E. Rhoden, one of the defendants in the trial court, and appellee-respondent Michael Littles, the sole plaintiff in the trial court. However, additional parties defendant in the trial court (the U. S. District Court for the Middle District of Florida, Jacksonville Division) were and are the State of Florida, the Florida Department of Corrections, Thomas Barton, Raymond Massey, J. Jowers, and L. Rosier.

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OPINIONS BELOW

With the exception of a preliminary November 4, 1985 opinion by the district court addressing and resolving various motions (see Appendix hereto at 4a, App. C), there are no opinions below. The February 26, 1986 order of the district court giving rise to petitioner Rhoden's appeal to the Eleventh Circuit was a summary denial without opinion of his

motion for reconsideration based on qualified immunity (Appendix at 11a, App. D). Likewise, the Eleventh Circuit summarily affirmed without opinion the district court's February 26, 1986 order (Appendix at 1a, App. A) and denied petitioner's petition for rehearing en banc (Appendix at 2a, App. B).[1]

JURISDICTION

The initial summary affirmance by the Eleventh Circuit was rendered August 6, 1986. On October 14, 1986, the Eleventh Circuit denied petitioner Rhoden's petition

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[1] Because an understanding of the matters involved in this proceeding require an examination of the pleadings giving rise to the various orders involved, this Court's attention is respectfully directed thereto. In relation to this, the complete record of all documents necessary to the full determination of this matter is contained in "Appellant's Record Excerpts" filed with the Eleventh Circuit, and it is suggested that this Court may wish to request a copy of those "Record Excerpts" from the Clerk for the Eleventh Circuit.

for rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

This case involves Section 1 of the 14th Amendment to the United States Constitution and 42 U.S.C. §1983. It also involves Fla. Stat. §§944.34 & .35 (1983) as well as two provisions of the Florida Administrative Code -- Rules 33-3.066 & 33-4.02(15), Fla. Admin. Code (1983) -- governing the use of physical force by Florida prison system correctional officers (such as petitioner Rhoden) on incarcerated inmates (such as respondent Littles).

Section 1 of the 14th Amendment provides in relevant part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The texts of Fla. Stat. §§944.34 & .35 (1983) are set forth in Apps. E & F hereto at, respectively, 13a and 14a.

The relevant subsections of Rule 33-3.066, Fla. Admin. Code (1983), are (1) - (4) & (7); they are set forth in App. G at 15a-18a. Likewise, the text of

Rule 33-4.02(15), Fla. Admin. Code (1983), is set forth in App. H at 19a-20a.

STATEMENT OF THE CASE

The central focus in this matter is the substantive constitutional law underlying the qualified immunity issue. In essence, the question is whether a state actor's alleged random and unauthorized conduct on January 19, 1983, which at best constitutes a state common law tort of assault and battery, nevertheless amounts to a 14th Amendment violation actionable in an individual §1983 damage action despite the existence of adequate state court post-deprivation tort remedies available to redress such conduct. It would seem clear that there is no 14th Amendment violation in such an instance. See Ingraham v. Wright, 430 U.S. 561 (1977) (a case arising out of Florida and addressing Florida law); cf. Hudson v. Palmer, 468 U.S. 517 (1984),

and Parratt v. Taylor, 451 U.S. 527 (1981) (building on Ingraham, but addressing property rather than liberty interests). In any event, at a minimum constitutional law is unsettled on this point and the circuits are in conflict.

At the time of the conduct giving rise to this matter, respondent Littles was an inmate confined at the Florida prison system's Union Correctional Institution in Raiford, Florida (R.Ex. 7, ¶2).[2] As alleged in respondent's complaint, this matter started on the afternoon of January 18, 1983, with respondent demanding a correctional officer retrieve certain of his

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[2] The reference "R.Ex." refers to "Appellant's Record Excerpts" on file with the Eleventh Circuit. See n. 1 herein, supra at p. 2. For this Court's convenience petitioner will provide specific reference to those Eleventh Circuit Record Excerpts here throughout, and again it is suggested this Court may wish to request a copy thereof from the Eleventh Circuit Clerk.

property from the prison property room (R.Ex. 8, ¶6).[3] Starting at approximately 8:30 a.m. the next day, January 19, 1983, respondent repeatedly shouted from his disciplinary confinement cell requesting an officer retrieve his property from the prison property room (R.Ex. 8, ¶7). Shortly thereafter petitioner Rhoden removed respondent from his cell and took him to the confinement barracks office where correctional officers Jowers and Rosier (defendants in the district court) were present along with two inmate runners (R.Ex. 8-9, ¶8).

The two inmate runners were told to

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[3] Except for the injury suffered by respondent, all facts are drawn from the allegations of respondent's complaint and presented in the light most favorable to him. As to respondent's injury, the facts to the extent completely undisputed are drawn from two affidavits (R.Ex. 79; R.Ex. 107-108) and respondent's prison medical room record (R.Ex. 15).

leave the office and, when they left, petitioner walked over to respondent, slapped him on the right side of the face, and said, "Come on bad ass, loud mouth" (R.Ex. 9, ¶9). Petitioner Rhoden then began to strike respondent repeatedly on the head and face (Ibid). When respondent backed up to avoid being struck by petitioner, defendant Jowers pushed respondent into the wall of the barracks office, and petitioner Rhoden then grasped respondent by the shirt collar, bent him down, and kicked him in the chest with his knee two or three times (R.Ex. 9, ¶10).

After petitioner had kneed respondent, respondent was told to wash his mouth out in the sink, was given his property from the property room, and was then escorted back to his disciplinary confinement cell (R.Ex. 9, ¶12).

Highly important to the foregoing and

the instant petition is the additional fact that, as alleged, petitioner Rhoden's actions were clearly unauthorized under state law and policy (R.Ex. 10, ¶14). Likewise they were clearly random, for there is no allegation in the complaint of anything other than this one isolated and unauthorized incident.

As for respondent's injuries, he was observed by another inmate upon return to his cell on January 19. That inmate observed bruises on the right side of respondent's face, respondent's face swollen, and a cut on respondent's lip, but made no observation as to the condition of respondent's hands (R.Ex. 107-108).

However, on respondent's first visit to the prison medical room five (5) days after the alleged incident, he did not complain of the alleged assault or the injuries he purportedly sustained as a result thereof

-- but only of needing a shaving permit (R.Ex. 79). Indeed, it was not until his second visit to the prison medical room nine (9) days after the alleged incident that respondent first complained of the assault and the injuries he purportedly sustained (R.Ex. 79; R.Ex. 15). Upon examination at that time (January 28, 1983) the prison doctor found only "possible contusions to both hands" and a "possible contusion [to the] right temporal area" of respondent, that respondent was "in no acute distress," and that "no treatment [was] indicated" (R.Ex. 15).

Over a year and a half later on August 9, 1984, respondent filed his complaint in this matter (R.Ex. 6-15). Thereby he sought damage as well as injunctive and declaratory relief under 42 U.S.C §1983 solely for the deprivation "of rights secured by the Constitution of the United

States" (R.Ex. 7, ¶1). Additionally, therein respondent made no 8th Amendment "cruel and unusual punishment" claim, but asserted only that the constitutional right of which he was deprived was his 14th Amendment due process right to "life and liberty" (R.Ex. 11-12, ¶¶20-21).

In response to subsequent motion by petitioner Rhoden (R.Ex. 57-80), respondent conceded that "his claims for declaratory and injunctive relief [are] moot as they pertain to Defendant Rhoden" (R.Ex. 94, ¶5) and "that the Eleventh Amendment bars his claim for damages against Defendant Rhoden in his official capacity" (R.Ex. 94, ¶4). Thus with respect to petitioner Rhoden and the posture of the instant case before this Court, the exclusive and only focus is upon respondent's remaining 14th Amendment damage claim against petitioner Rhoden in his individual capacity.

As for petitioner Rhoden's motion with respect to that individual damage claim, it asserted Parratt v. Taylor, 451 U.S. 527 (1981), as well as the Eleventh Circuit's July 9, 1984 panel decision in Gilmere v. City of Atlanta, 737 F.2d 894, 905-10 (11th Cir. 1984),[4] required its dismissal because the existence of adequate post-deprivation state court remedies prevented the random and unauthorized conduct here complained of from rising to the level of a 14th Amendment constitutional violation (R.Ex. 58 & 67-69). The motion also asserted, inter alia, that qualified immunity barred the remaining individual damage claim because, given the lack of respondent's injury, constitutional law was at a minimum unsettled

[4] Complete cite is: Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), rev'd in part & aff'd in part, 774 F.2d 1495 (11th Cir. 1985) (en banc), cert. denied sub nom, Sampson v. Gilmere, ____ U.S. ____, 90 L.Ed.2d 673 (1986).

as to whether the complained of conduct even rose to the level of a 14th Amendment violation (R.Ex. 57 & 65-66).

The district court delayed ruling on these matters until the Eleventh Circuit issued its October 15, 1985 en banc decision in Gilmere, 774 F.2d 1495 (11th Cir. 1985), which reversed the panel on the instant 14th Amendment due process liberty interest point -- the en banc court holding in essence that a 14th Amendment due process liberty interest violation was complete and actionable upon the occurrence of the conduct irrespective of any post-deprivation remedies, 774 F.2d at 1499-1500. Three weeks after the Eleventh Circuit's en banc Gilmere decision, the district court entered an order which, among other things, denied petitioner Rhoden's motion (App. C at 8a & 9a, ¶3; R.Ex. 55 & 56, ¶3). As it pertained to petitioner's motion, the order

did not address his qualified immunity argument, but only his direct Parratt v. Taylor and Gilmere Eleventh Circuit panel argument, and rejected the same in light of the Eleventh Circuit's October 15, 1985 en banc Gilmere decision (App C at 8a; R.Ex. 55).

Promptly thereafter petitioner Rhoden filed a motion for reconsideration (R.Ex. 22-35). That motion reasserted the previously raised but unaddressed qualified immunity point (R.Ex. 22-26). However, and as critical to the instant petition, it also newly raised the additional point that qualified immunity also barred the respondent's remaining individual constitutional damage claim because at the time of the conduct in question on January 19, 1983, constitutional law was clearly unsettled as to whether the existence of adequate post-deprivation state court tort remedies

prevented a random and unauthorized assault such as the one here alleged from rising to the level of a violation of a 14th Amendment due process liberty interest to bodily integrity (R.Ex. 22-26). This was urged to be especially so in the Eleventh Circuit given the interplay of its July 9, 1984 and October 15, 1985 Gilmere panel and en banc decisions (R.Ex. 24-26).

By one page order of February 26, 1986, the district court denied this qualified immunity motion without explanation or reasons (see App. D hereto at 11a). Thereafter petitioner timely invoked the jurisdiction of the Eleventh Circuit pursuant to 28 U.S.C. §1291 and the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), as recently made applicable to denials of qualified immunity motions in Mitchell v. Forsyth, 472 U.S. _____, 86 L.Ed.2d 411 (1985). On

August 6, 1986, the Eleventh Circuit affirmed without opinion (App. A at 1a), and on October 14, 1986, it denied rehearing en banc (App. B at 2a).

There can be only one reason for the decisions of the courts below, though no reasons were given therefor. Specifically, in order to reject petitioner Rhoden's claim of qualified immunity those courts had to determine that at the time of the conduct herein complained of, January 19, 1983, constitutional law was clearly established on the instant 14th Amendment due process liberty interest issue. In other words, of necessity they determined constitutional law was and is clearly established that a state actor's random and unauthorized use of undue or excessive force upon an individual's person constitutes an actionable constitutional deprivation of such individual's 14th Amendment

due process liberty interest to bodily integrity, irrespective of the existence of adequate state court post-deprivation tort remedies available to redress such deprivation.

REASONS FOR GRANTING THE WRIT

The 14th Amendment due process liberty interest issue underlying the instant qualified immunity matter presents a question of federal constitutional law that is currently of paramount concern and importance. It is a question on which a number of federal circuit judges have recently expressed well-reasoned serious doubt and concern as to its ultimate resolution by this Court. See, e.g., Mann v. City of Tuscon, Dep't of Police, 782 F.2d 790, 794-800 (9th Cir. 1986) (Sneed, J., concurring); Dykes v. Hosemann, 776 F.2d 942, 950-53 (11th Cir. 1985) (en banc) (Tjoflat, J., joined by Fay and Anderson, JJ., con-

curring and dissenting).[5] And it is a question that this Court has not, but should here and now, ultimately and finally settle.

Further, the of necessity resolution by the lower courts in this case of the underlying 14th Amendment due process liberty interest issue conflicts with this Court's decision in Ingraham v. Wright, 430 U.S. 561 (1977) (which case also arose out of Florida), as well as its subsequent decisions in Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984). In Ingraham it should be remembered this Court found, among other things, that the use of undue or excessive force in the paddling of Florida school students

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[5] Complete cite is: Dykes v. Hosemann, 776 F.2d 942 (11th Cir. 1985) (en banc), panel decision following en banc remand, 783 F.2d 1000 (11th Cir. 1986), cert. denied sub nom, Dykes v. Dykes, 55 U.S.L.W. 3385 & 3391 (Sup. Ct. No. 85-1976, Dec. 1, 1986).

would not be a violation of those students' 14th Amendment due process liberty interest to bodily integrity because Florida's common law tort remedies provided a sufficient post-deprivation mechanism to redress such. 430 U.S. at 683; cf. Id. at 661 & 661 nn. 19 & 20 (general discussion of common law tort remedies as well as criminal sanctions available to remedy the use of undue force in the paddling of school students). Ingraham provided the principal authority for this Court's subsequent decision in Parratt v. Taylor, and in Hudson v. Palmer this Court unanimously extended the Parratt rationale to intentional deprivations.

Additionally the various federal circuits are in clear conflict and, indeed, all over the board on this 14th Amendment issue. The 4th Circuit holds there is no violation of a 14th Amendment due process

liberty interest where the conduct is random and unauthorized and where there exist adequate post-deprivation state court tort remedies available to redress such conduct, Daniels v. Williams, 720 F.2d 792, 794-99 (4th Cir. 1983), aff'd, 748 F.2d 229 (4th Cir. 1984) (en banc), aff'd on other grounds, 474 U.S. ___, 88 L.Ed. 2d 662 (1986). The 6th Circuit holds similarly, Wilson v. Beebe, 770 F.2d 578, 581-85 (6th Cir. 1985) (en banc); Leber v. Smith, 773 F.2d 101, 104-05 (6th Cir. 1985), cert. denied, ___ U.S. ___ , 89 L.Ed.2d 722 (1986), as have the 7th Circuit, Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.), cert. denied, 459 U.S. 1069 (1982), and the 5th Circuit, Thibodeaux v. Bordelon, 740 F.2d 329, 334-39 (5th Cir. 1984). A district court in the 8th Circuit, with perhaps one of the better reasoned currently extant discussions of this

Court's precedent, has held likewise, Hanson v. Larkin, 605 F.Supp. 1020, 1022-26 (D. Minn. 1985).

Early on, the 9th Circuit held identically with respect to an intentional deprivation of a liberty interest, Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), aff'd on other grounds sub nom, Kush v. Rutledge, 460 U.S. 719 (1983), although its more recent position seems less clear, Haygood v. Younger, 769 F.2d 1350, 1355-58 (9th Cir. 1985) (en banc), cert. denied sub nom, Cranke v. Haygood, ___ U.S. ___, 92 L.Ed.2d 739 (1986); Mann v. City of Tuscon, Dep't of Police, 782 F.2d 790 (9th Cir. 1986).

In contrast, the 11th Circuit holds the 14th Amendment due process liberty interest violation is complete and actionable upon occurrence of the conduct, irrespective of whether the conduct was random and unau-

thorized and irrespective of whether there exist adequate post-deprivation state court tort remedies available to redress such conduct, Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1500 (11th Cir. 1985) (en banc), rev'g on this point, 737 F.2d 894, 905-10 (11th Cir. 1984), cert. denied sub nom, Sampson v. Gilmere, ___ U.S. ___, 90 L.Ed.2d 673 (1986); Fundiller v. City of Cooper City, Fla., 777 F.2d 1436, 1439-40 & n.2 (11th Cir. 1985), rev'g on this point, 578 F.Supp. 303, 304-05 (S.D. Fla. 1984); Byrd v. Clark, 783 F.2d 1002, 1005-06 (11th Cir. 1986). The 3rd Circuit has held to similar effect, Davidson v. O'Lone, 752 F.2d 817, 821-22 (3d Cir. 1984) (en banc), aff'd on other grounds sub nom, Davidson v. Cannon, 474 U.S. ___, 88 L.Ed.2d 677 (1986).

Further, and quite possibly even more important than the significant unsettled

question of federal constitutional law here involved and resolution of conflict among the circuits on the point, is the impact a decision in this case will have on the thousands of prisoner civil rights cases flooding the federal courts -- a vast number and, possibly, majority of which involve 14th Amendment undue force (i.e., prison officer assault) claims.

Were it determined herein that qualified immunity barred a §1983 individual damages action based on an asserted deprivation of a 14th Amendment due process liberty interest to bodily integrity, either because there is no 14th Amendment violation where there exist adequate post-deprivation state court tort remedies available to redress a state actor's random and unauthorized application of undue force to an individual's person or because, at a minimum, constitutional law is unsettled on

the point, such would significantly reduce the present flood of prisoners' civil rights cases in our increasingly overburdened federal courts. Additionally, such a decision would also have a significant impact on police and other 14th Amendment undue force civil rights cases throughout the United States.

Finally, the decisions by the lower courts herein, that qualified immunity does not bar respondent's §1983 individual 14th Amendment constitutional damage action against petitioner, conflict with this Court's recent trilogy of qualified immunity decisions: Harlow v. Fitzgerald, 457 U.S. 800, 813-19 (1982); Davis v. Scherer, 468 U.S. 183 (1984), rev'g, 710 F.2d 838 (11th Cir. 1983) (mem.), aff'g without opinion, 543 F.Supp. 4 (N.D. Fla. 1981); and Mitchell v. Forsyth, 472 U.S. ___, 86 L.Ed.2d 411, 424-31 (1985). Indeed Davis

v. Scherer, which also involved a 14th Amendment due process issue, presents a situation analogous to this case, for therein this Court reversed on qualified immunity grounds the 11th Circuit's summary affirmance without opinion of a Florida district court decision.

Moreover, the 11th Circuit's October 15, 1985 en banc reversal (774 F.2d at 1499-1500) of its July 9, 1984 Gilmere panel decision (737 F.2d at 905-10)[6] on this 14th Amendment liberty interest due process issue also serves to establish that at least until October 15, 1985, which is well after the January 19, 1983 conduct here complained of, even in the 11th Circuit constitutional law was at a minimum not clearly established on the issue. Thus, there is no reasoned explanation for

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[6] For full citation of Gilmere, see n. 4 supra.

the lower courts' rejection of qualified immunity herein except the "hindsight-based reasoning" which this Court sharply criticized in Mitchell v. Forsyth, supra 472 U.S. at ____, 86 L.Ed.2d at 431.

For these reasons certiorari should be granted and the case set for plenary briefing and argument.

I. Random & Unauthorized Nature of Complained of Conduct

Quite clearly, petitioner Rhoden's actions as alleged in the complaint were unauthorized under state law and policy (R.Ex. 8-10, ¶¶6-16). See Fla. Stat. §944.35 (1983) (App. F), as well as Rules 33-3.066 & 33-4.02(15), Fla. Admin. Code (1983) (Apps. G & H); cf. Fla. Stat. §944.34 (1983) (App. E). Likewise they were clearly random, for there is no allegation in the complaint of anything other than this one isolated and unau-

thorized incident, i.e., there is no allegation in the complaint that this was but one of among many similar, ongoing, and repeated incidents. In other words, just as in Hudson v. Palmer, supra, there is here no way Florida could have predicted petitioner Rhoden's intentional disregard of state law and provided any sort of pre-deprivation process.

In relation to the issue of qualified immunity, equally important is that these same state regulations also clearly invest correctional officers such as petitioner with discretionary authority "to apply [reasonably necessary] physical force to the person of an inmate" such as respondent, Rule 33-3.066(1), supra; accord, Rule 33-4.02(15), supra.[7] In this

[7] Indeed, the instant Florida administrative rules appear to grant greater discretionary authority than the Florida administrative rules at issue in Davis v. Scherer, supra 468 U.S. at 188 n. 6.

regard, the lower courts in this case completely ignored this Court's commands in Davis v. Scherer, supra 468 U.S. at 193-97 & 196 n. 14, that the violation of Florida statutes and administrative regulations, no matter how egregious, was to have absolutely no bearing on the issue of the qualified immunity of Florida state actor defendants in a §1983 14th Amendment constitutional deprivation case such as this. Indeed, Davis compels the application of qualified immunity in the instant case, and the lower courts' refusal to do so herein is in clear conflict therewith.

II. Availability & Adequacy of Florida's State Remedies

Under Florida law the Florida courts are fully open to convicted and incarcerated felons such as respondent to file and prosecute civil tort actions. Lloyd v. Farkash, 476 So.2d 305 (Fla. 1st DCA 1985);

accord, McCuiston v. Wanicka, 483 So.2d 489 (Fla. 2d DCA 1986).[8] Moreover, Florida's tort claims act (Fla. Stat. §768.28) permitted and permits a tort claim to be brought directly against a state employee such as petitioner where, as here, it is asserted "he acted in bad faith or with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights or property." See, e.g., Rupp v. Bryant, 417 So.2d 658, 669-71 (Fla. 1982) (Overton, J., joined by McDonald, J., concurring); Bryant v. Duval County Hospital Authority, 459 So.2d 1154, 1155 (Fla. 1st DCA 1984); see also Fla. Stat.

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[8] Lloyd and McCuiston, supra, were cited to the lower federal courts in this case. Additionally, it should be noted that the other Florida Courts of Appeal have been consistent and uniform in their application of Lloyd and McCuiston. E.g., Sabin v. Butler, 493 So.2d 469 (Fla. 3d DCA 1986); Collins v. Cote, 490 So.2d 164 (Fla. 4th DCA 1986).

§768.28(9)(a) (1981), and compare with Fla. Stat. §768.28(9)(a) (1986 Supp.).[9] Further, where the employee would not be personally subject to suit, a tort action may be brought directly against that employee's governmental employer. Rupp, supra; Bryant, supra; Fla. Stat. §768.28(9)(a), supra.

In short, in 1977 in Ingraham v. Wright this Court found Florida's common law tort remedies provided sufficient adequate and available post-deprivation process. Today, ten years later in 1987, Florida's state court tort remedies are, if anything, even more adequate and available -- especially for Florida prison system inmates such as

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[9] Though not directly relevant to the instant matter, a Florida court tort action may also be brought directly against a state employee for acts outside the scope of his employment. E.g., Bryant v. Duval County Hospital Authority, supra at 1555; Fla. Stat. §768.28(9)(a), supra.

respondent. All excess verbiage and baggage aside, this case presents nothing more than a random and unauthorized assault and battery tort claim, and it ought to have been brought and heard in state court.

CONCLUSION

In the case at hand the 11th Circuit ignored the clear qualified immunity commands specifically given it by this Court in Davis v. Scherer, supra. The fact that petitioner Rhoden's conduct was unauthorized under and violated Florida state law and policy is totally irrelevant to the legal fact that at the time of the conduct complained of (January 19, 1983) constitutional law, even in the 11th Circuit, was not clearly established on the instant underlying 14th Amendment due process liberty interest issue. And the fact that in the 11th Circuit constitutional law adverse to petitioner on the

point subsequently became settled on October 15, 1985, Gilmere, supra 774 F.2d at 1499-1500 (en banc), provides no basis for rejecting a claim of qualified immunity with respect to the earlier occurring conduct herein complained of. Mitchell v. Forsyth, supra. Qualified immunity, whether it be that of the Attorney General as in Mitchell or that of a prison system correctional officer as here, is equally important. The decisions of this Court teach that, where applicable, it is fully available to all without regard to "importance" of office, and it should not have been so lightly treated by the lower courts in this case.

Further, this Court's decisions in Ingraham v. Wright, Parratt v. Taylor, and Hudson v. Palmer, supra, indicate there is no 14th Amendment due process violation in a situation such as that presented by the

instant case. The bottom line is, however, that the federal circuits are in substantial and significant conflict on this underlying 14th Amendment issue, and they will remain so absent further direction from this Court. Moreover, unless review is granted and the 11th Circuit reversed, either because there is no 14th Amendment violation or because at a minimum constitutional law is clearly unsettled on the point, a vast number of prisoner civil rights constitutional damage actions -- which as here present nothing more than random and unauthorized common law assault and battery tort claims -- will continue to flood our overburdened federal courts.

Accordingly, petitioner again respectfully suggests that certiorari be granted.

Respectfully submitted,

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D. E. Rhoden

JANUARY 1987

A P P E N D I C E S

APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3193
Non-Argument Calendar

MICHAEL LITTLES, # 047123,
Plaintiff-Appellee,

versus

D. E. RHODEN,
Defendant-Appellant,

and

L. ROSIER, et al.,
Defendants.

Appeal from the
United States District Court
for the Middle District of Florida

(August 6, 1986)

Before GODBOLD, Chief Judge,
VANCE and JOHNSON, Circuit Judges.

PER CURIAM:
AFFIRMED. See Circuit Rule 25.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3193

Filed Oct. 14, 1986

MICHAEL LITTLES,
Plaintiff-Appellee,

versus

D. E. RHODEN,
Defendant-Appellant,

and

L. ROSIER, et al.,
Defendants.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion___, 11 Cir., 198___, ___F.2d ___)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

(xxx) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-6
(rev. 6/82)

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHAEL LITTLES,

Plaintiff,

vs. Case No. 84-773-Civ-J-14

D. E. RHODEN, L. ROSIER,
J. JOWERS, RAYMOND MASSEY,
THE STATE OF FLORIDA, and
THE FLORIDA DEPARTMENT
OF CORRECTIONS,

Defendants.

ORDER

Plaintiff, an inmate of the Florida penal system who is represented by counsel, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 on August 9, 1984. He names D. E. Rhoden, L. Rosier, J. Jowers, Raymond Massey, the State of Florida, and the Florida Department of Corrections as the defendants in the action. Defendants Rhoden, Rosier, Jowers, and Massey are sued

in their individual and official capacities. However, the State of Florida and the Florida Department of Corrections are joined as defendants for the mere purpose of assessing attorneys' fees and costs pursuant to Glover v. Alabama Department of Corrections, 734 F.2d 691 (11th Cir. 1984).

On January 2, 1985, defendants Rosier and Jowers, in their official capacities; Raymond Massey, in his individual and official capacities; the State of Florida; and the Florida Department of Corrections filed a Motion to Dismiss and/or for Summary Judgment. Plaintiff responded on January 18, 1985.

Based on a review of the most recent Eleventh Circuit cases on this issue and the recent United States Supreme Court decision in Kentucky v. Graham, 53 U.S.L.W. 4966 (U.S. June 28, 1985), this Court is of the opinion that defendants' Motion to

Dismiss and/or for Summary Judgment should be denied. Kentucky v. Graham, supra, specifically dealt with a "personal-capacity action." The Court merely held that the Court of Appeals erred in awarding attorneys' fees against the Commonwealth when the suit itself was against a government official sued for money damages in his individual capacity. Further, the Court mentioned that the Commonwealth refused to defend any of the individual defendants, including the Commissioner, or to pay their litigation expenses. In Glover, supra, the Eleventh Circuit noted that not only did the Attorney General represent the defendant throughout the proceedings, but also the only reason damages weren't assessed against him in his official capacity was because the Eleventh Amendment bars such an award. This Court, based on Kentucky v. Graham, supra, as well

as Glover, supra, must deny defendants' Motion to Dismiss and/or for Summary Judgment at this time. At this point in the proceedings, plaintiff has properly joined the State of Florida and the Florida Department of Corrections as defendants in the action for the sole purpose of assessing attorneys' fees. Further, it is clear that a state official cannot be sued in his official capacity for damages, Pennhurst State School & Hospital v. Halderman, 104 S.Ct. 900 (1984); however, plaintiff here has not sued these state officials in their official capacities for monetary relief. Finally, it is clear that plaintiff cannot attempt to hold defendant Massey liable under the theory of respondeat superior; however, plaintiff attempts to hold defendant Massey liable because of his alleged failure to properly train Rosier, Jowers, and Rhoden and his

failure to enforce the laws of the State and the prison system.

On May 28, 1985, defendant Rhoden filed a Motion to Dismiss and/or for Summary Judgment. Plaintiff, on September 6, 1985, filed Plaintiff's Response to Defendant Rhoden's Motion to Dismiss or Motion for Summary Judgment. This Court is of the opinion that defendant Rhoden's Motion to Dismiss and/or Summary Judgment should be denied because, notwithstanding Parratt, the substantive due process claim alleged in this case may be asserted in federal court regardless of the existence of a state tort remedy. See Gilmere v. City of Atlanta, Nos. 82-8457, 82-8760 (11th Cir. Oct. 15, 1985). Accordingly, it is now

ORDERED AND ADJUDGED:

1. Defendants' January 2, 1985, Motion to Dismiss and/or for Summary Judgment is **denied.**

2. Defendant State of Florida's January 7, 1985, Supplement to Defendant State of Florida's Motion to Dismiss and/or Motion for Summary Judgment is denied as moot. Service of process was returned executed against the defendant State of Florida on January 15, 1985.

3. Defendant Rhoden's May 28, 1985, Motion to Dismiss and/or for Summary Judgment is denied.

4. Plaintiff's September 3, 1985, Motion to Substitute Party is granted.

5. The Clerk of the Court shall substitute Thomas Barton for Raymond Massey as a defendant in this case.

6. The Clerk of the Court shall change the style of the case to read: Michael Littles v. D. E. Rhoden, L. Rosier, J. Jowers, Thomas Barton, the State of Florida, and the Florida Department of Corrections.

7. Defendants, within thirty (30) days from the date of this order, shall file an Answer to plaintiff's complaint. Defendants Rosier and Jowers filed an Answer on January 2, 1985; however, this Answer pertains only to their individual capacities. They, too, must submit an Answer.

DONE AND ORDERED at Jacksonville, Florida, this 4th day of November, 1985.

/s/Howell W. Melton
UNITED STATES DISTRICT JUDGE

Copies to:

Peter P. Sleasman, Esquire
Ass't Attorney General (Maher)
Mang & Stowell, P.A.
Staff Counsel (sse-1025)

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHAEL LITTLES,

Plaintiff,

vs. Case No. 84-773-Civ-J-14

D. E. RHODEN, L. ROSIER, J. JOWERS, RAYMOND MASSEY, THOMAS BARTON, THE STATE OF FLORIDA, and THE FLORIDA DEPARTMENT OF CORRECTIONS,

Defendants.

ORDER

1. Defendant Rhoden's December 2, 1985, Motion for Reconsideration of Defendant Rhoden's Motion to Dismiss and/or for Summary Judgment is denied.

2. Defendant Rhoden, within thirty (30) days from the date of this order, shall file an Answer to plaintiff's

complaint.

DONE AND ORDERED at Jacksonville, Florida, this 26 day of February, 1986.

/s/ Susan H. Black
UNITED STATES DISTRICT JUDGE

Copies to:

Peter P. Sleasman, Esquire
Mang & Stowell
Ass't Attorney General (Maher)
Staff Counsel (sse 219)

APPENDIX I

SECTION 944.34

FLORIDA STATUTES (1983)

944.34 **Order and punishment.** - All necessary means shall be used by the superintendents, and such punishments as may be needful shall be adopted to maintain order, enforce obedience and discipline, suppress insurrection, prevent escapes, and compel performance of labor; but no cruel or inhuman punishment shall be inflicted upon any prisoner, and no punishment injurious to the mind or the body of the prisoner shall be permitted, nor shall any prisoner be compelled to labor without sufficient food.

APPENDIX F

SECTION 944.35

FLORIDA STATUTES (1983)

944.35 **Corporal punishment prohibited; penalty.** - It is unlawful for any corporal punishment, any cruel or inhuman punishment, or any punishment by which the flesh of the body is broken, bruised, or lacerated to be inflicted upon any prisoner at any time. Any person who violates the provisions of this section shall be discharged immediately and shall not again be employed in any capacity in connection with the correctional system and shall be punished as provided by law for whatever offense he may have committed in perpetrating the act. No prisoner shall be punished because of any report or representation which he may have made to any inspector.

APPENDIX G

RULES 33-3.066 (1) - (4) and (7),

Fla. Admin. Code (1983)

33-3.066 **Use of Force.**

(1) Employees are authorized to apply physical force to the person of an inmate only when and to the degree that it reasonably appears necessary:

(a) in self-defense,

(b) to prevent escape,

(c) to prevent injury to a person or damage to property,

(d) to quell a disturbance,

(e) to overcome physical resistance to a lawful command, or

(f) to administer medical treatment under the provisions of subsection (4).

Physical force shall be employed only as a last resort when it reasonably appears that alternatives are not feasible. When

the use of force is justified, only that amount and type of force that reasonably appears necessary to accomplish the authorized objective shall be employed.

(2) There shall be no corporal punishment of any kind. Handcuffs, leg irons and other such devices shall be used only for restraint, and not for punishment.

(3) Whenever force is used a detail written Report of Force Used shall be prepared and dated by the employees using force or making the decision to use force. Each employee involved in the use of force shall prepare an independent Report of Force Used within 5 working days of the incident. The Superintendent shall have an investigation made and shall, in writing, approve the use of force as justified or disapprove it as unjustified, stating the reasons for his approval or disapproval. The employee's report and the Superintendent's evaluation shall be for-

warded within 5 working days of the date of the completion of the investigation to the Regional Director, who shall, in writing, concur in the Superintendent's evaluation or disapprove it. Copies of the employee's report, the Superintendent's evaluation and the Regional Director's review shall be kept in the files of both inmate and employee.

(4) Force or restraint may be used to administer medical treatment only by or under the supervision of a physician or his designee, and only

(a) when treatment is necessary to protect the health of other persons, as in the case of contagious and venereal diseases, or

(b) when treatment is offered in satisfaction of a duty to protect the inmate against self-inflicted injury or death. The physician shall prepare a report documenting the facts and reasons

upon which his finding was based. The physician's report shall be attached to the Report of Force Used.

*** *** ***

(7) In all cases where physical force is used to manage an inmate, the inmate and/or employees should be provided with an opportunity for medical examination. Appropriate medical treatment will be provided immediately if an inmate or employee is injurred. Any such treatment or follow-up action shall be documented in the Report of Force Used.

*** *** ***

APPENDIX H

RULE 33.402 (15)

Fla. Admin. Code (1983)

(15) No employee shall apply physical force to the person of an inmate or person under his supervision except and only to the degree that it appears to be necessary in self-defense, to prevent escape, to prevent injury to a person or damage to property, to quell a disturbance, or when the inmate exhibits physical resistance to a lawful command. When force becomes necessary, a detailed written report shall be made by the employee to the Superintendent's who shall have an investigation made and shall approve or disapprove the force used. The employee's report, together with the Superintendent's written approval or disapproval of the force used and his reasons therefore, shall be forwarded by

the Superintendent to the Secretary. Copies are to be filed in both the employee's and inmate's record jackets after review by the Secretary and his action noted on the report.